No. 88-2041

In the Supreme Court

OF THE

United States

APRIL TERM, 1990

EVERETT A. SISSON
Petitioner,

v.

BURTON B. RUBY, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeal for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN AUTO, INC. IN SUPPORT OF PETITIONER, EVERETT A. SISSON

TERENCE S. COX
(Counsel of Record)
DENNIS J. HERRERA
DERBY, COOK, QUINBY & TWEEDT
333 Market Street, Suite 2800
San Francisco, CA 94105
(415) 777-0505
Attorneys for Amicus Curiae American Auto, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST., • S.F., CA 94103 • (415) 284-2200

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MOTION IN SUPPORT OF LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN AUTO, INC. IN SUPPORT OF PETITIONER, EVERETT A. SISSON

American Auto, Inc. ("American Auto") respectfully moves that this Court grant it leave to file the attached brief *Amicus Curiae* in support of the position of the petitioner, Everett A. Sisson. American Auto has not been successful in obtaining the written consent of the parties to the case, and thereby files this motion contemporaneously with its proposed brief *Amicus Curiae* pursuant to Supreme Court Rule 36.3.

INTEREST OF THE AMICUS CURIAE

The interest of American Auto in this case arises from the fact that American Auto is the appellant in the pending Ninth Circuit case known as *In The Matter Of The Complaint Of American Auto, Inc.*, Court of Appeals No. 89-15689. The written briefing

before the Ninth Circuit has been completed in *American Auto*, but no date has been assigned for oral argument. The appeal in *American Auto* is from a reported district court decision *In the Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C. 1489 (N.D. Cal. 1989). The district court dismissed the case, adhering to the Seventh Circuit admiralty jurisdictional tests articulated *In The Matter Of The Complaint Of Sisson* 867 F.2d 341 (7th Cir. 1989). American Auto does not believe that its position will be adequately presented by the parties to the *Sisson* case, within the meaning of Rule 36.3, unless this brief is considered.

In The Matter Of The Complaint Of American Auto, Inc. presents the same issues that are before the Court in the present case: First, whether torts involving noncommercial pleasure vessels which pose a potential threat to commercial shipping are sufficiently related to traditional maritime activity to permit a federal court to exercise admiralty jurisdiction even where the tort does not implicate navigation; and second, whether the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.*, independently creates subject matter jurisdiction in the federal courts statutorily, separate and distinct from the test for constitutional admiralty/maritime jurisdiction.

More importantly, the facts in the *American Auto* case provide a vivid illustration that the Seventh Circuit's jurisdictional tests would be difficult to apply and would disrupt the uniform application of federal maritime law. American Auto believes that the facts presented by *Sisson* are deceptively straightforward. *Sisson* involves a vessel which burned within its sheltered marina, with no loss of life or injury to persons. Neither was there any danger of the inconsistent application of other federal maritime statutes.

American Auto presents more difficult issues. Its factual pattern has a far closer nexus with traditional maritime activity than is presented to this Court in *Sisson*, and thus highlights deficiencies in the rule adopted by the Seventh Circuit.

American Auto filed a complaint seeking exoneration from or limitation of liability under 46 U.S.C. § 183 *et. seq.* for injuries and/or damages arising out of a fire aboard the vessel ANTICIPATION on January 9, 1988 off the coast of Cabo San Lucas, Mexico.

On April 21, 1989, the district court granted the claimant's motion to dismiss based upon its reading of the Seventh Circuit case, *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989). The district court held that admiralty jurisdiction did not apply because torts involving noncommercial pleasure vessels are not sufficiently related to traditional maritime activity within the meaning of *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972), and *Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982), unless the tort involves at least a potential threat to commercial shipping and involves navigation.

PRACTICAL CONCERNS RAISED BY THIS AMICUS WHICH MAY NOT BE ADDRESSED BY THE PARTIES TO THIS PETITION

The factual background to American Auto's limitation petition should raise concerns with this Court as to the wisdom of adopting the Seventh Circuit's reasoning or limiting this Court's expansive language in *Foremost*. The facts presented in *American Auto*, which this Court could consider at least in the context of raising hypothetical problems, illustrate the difficulty in interpreting *Foremost* restrictively.

As reflected by the district court opinion in *In the Matter of the Complaint of American Auto, Inc.*, and in the briefs and record with the Ninth Circuit in that appeal (Court of Appeals No. 89-15689), the following facts were introduced on the admiralty jurisdictional issue in the *American Auto* case.

(1) The yacht ANTICIPATION, owned by American Auto, burned and sank at night while at her moorage off the coast of Cabo San Lucas, Mexico, on January 9, 1988.

(2) The mooring to which the ANTICIPATION was attached on the night of the fire was located in an open harbor, fronting the Pacific Ocean. The vessel was anchored hundreds of yards from the shore in the outer harbor of Cabo San Lucas, in the vicinity of the main shipping channel leading to the inner

harbor. Commercial vessels, such as large passenger ferries, fishing boats and passenger cruise line shore boats transit the main ship channel to enter the Cabo San Lucas inner harbor.

(3) At the time of the loss, the vessel had seven people on board, including two professional crew members.

(4) Two passengers on board the vessel died, and several of the other people on board suffered personal injuries. The vessel herself was a total loss.

(5) Immediately prior to the loss, the ANTICIPATION had just completed transiting international waters in the Pacific Ocean, having travelled from San Diego, California to Cabo San Lucas, Mexico.

(6) The yacht ANTICIPATION was used as a meeting and entertainment place for employees, business clients, prospective clients and guests, as well as for pleasure and recreation. The vessel at no time carried fare-paying passengers nor did it transport any cargo for compensation.

(7) The Port Captain of Cabo San Lucas required American Auto to mark the site of the sunken wreck with a lit buoy, on the basis that it constituted a hazard to navigation.

(8) The yacht, after it sank, was ordered by the Port Captain of Cabo San Lucas to be raised, brought to the beach and destroyed, as a hazard to navigation.

(9) The representatives of the two deceased passengers filed claims in the federal limitation action and separate suits in the California courts alleging the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et. seq.*, as a basis of jurisdiction.

The allegations made against American Auto involve the vessel's operation, management, maintenance, and seaworthiness. The claimants in *American Auto* have alleged, among other matters, that the vessel owner (1) failed to maintain a seaworthy vessel, particularly in regard to her fire warning systems, extinguishing systems and available escape routes, (2) failed to hire and train a competent, professional crew, (3) failed to maintain a

proper lookout at night, and (4) failed to conduct adequate safety drills.

Claims have been made against American Auto in the limitation action and pursuant to DOHSA. The facts in *American Auto*, more dramatically than those in the *Sisson* case before this Court, highlight the fact that the federal admiralty statutes operate in a complex interplay to protect and define the rights and obligations of the parties to maritime disputes.

CONCLUSION

American Auto respectfully requests that this Court grant it leave to file the attached proposed Brief *Amicus Curiae* in Support of Petitioner Everett A. Sisson on the basis that *Amicus Curiae* American Auto can present to this Court a different perspective which illustrates the difficulty of applying the Seventh Circuit jurisdictional tests, and their adverse effect upon a multitude of admiralty cases.

Dated: March 2, 1990.

Respectfully submitted,

TERENCE S. COX
(Counsel of Record)
DENNIS J. HERRERA
DERBY, COOK, QUINBY & TWEEDT
333 Market Street, Suite 2800
San Francisco, CA 94105
(415) 777-0505
Attorneys for Amicus Curiae
American Auto, Inc.

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INTEREST OF THE AMICUS CURIAE

The interest of American Auto in this case arises from the fact that American Auto is the appellant in the pending Ninth Circuit case known as *In The Matter Of The Complaint Of American Auto, Inc.*, Court of Appeals No. 89-15689. The written briefing before the Ninth Circuit has been completed in *American Auto,* but no date has been assigned for oral argument. The appeal in *American Auto* is from a reported district court decision, *In the Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C.

1489 (N.D. Cal. 1989). The district court dismissed the case, adhering to the Seventh Circuit admiralty jurisdictional tests articulated *In The Matter Of The Complaint Of Sisson* 867 F.2d 341 (7th Cir. 1989). American Auto does not believe that its position will be adequately presented by the parties to the *Sisson* case, within the meaning of Rule 36.3, unless this brief is considered.

In The Matter Of The Complaint Of American Auto, Inc., presents the same issues that are before this Court in the present case: First, whether torts involving noncommercial pleasure vessels which pose a potential threat to commercial shipping are sufficiently related to traditional maritime activity to permit a federal court to exercise admiralty jurisdiction even where the tort does not implicate navigation; and second, whether the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.* independently creates subject matter jurisdiction in the federal courts statutorily, separate and distinct from the test for constitutional admiralty jurisdiction.

More importantly, the facts in the *American Auto* case provide a vivid illustration that the Seventh Circuit's jurisdictional tests would be difficult to apply and would disrupt the uniform application of federal maritime law. American Auto believes that the facts presented by *Sisson* are deceptively straightforward. *Sisson* involve a vessel which burned within its sheltered marina, with no loss of life or injury to persons. Neither was there any danger of the inconsistent application of other federal maritime statutes.

American Auto, Inc. highlights more difficult issues. Its factual pattern has a far closer nexus with traditional maritime activity than is presented to this Court in *Sisson*, and highlights deficiencies in the rule adopted by the Seventh Circuit.

In *American Auto, Inc.*, a vessel (The "ANTICIPATION"), moored off the coast of Cabo San Lucas, Mexico in a bay open to the Pacific Ocean, burned and sank on January 9, 1988 near a main shipping channel, with loss of life. Suits were brought alleging the Death on the High Seas Act, 46 U.S.C. § 761 *et. seq.* (hereinafter referred to as "DOHSA"), as a basis of jurisdiction.

American Auto filed a complaint in the United States District Court for the Northern District of California seeking exoneration

from or limitation of liability under 46 U.S.C. § 183 *et. seq.*, for injuries and/or damages arising out of the fire aboard the vessel ANTICIPATION. Claims were filed in the limitation proceeding by the passengers aboard the vessel who survived the fire, and by the representatives of two deceased passengers who died as a result of the fire. Three of the claimants moved the district court to dismiss American Auto's limitation complaint for lack of subject matter jurisdiction and/or for summary judgment, arguing both that the loss did not involve issues of traditional maritime concern and that pleasure vessels should not be included within the jurisdictional limits of the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.*, and/or the general maritime law.

On April 21, 1989, the district court granted the claimants motion to dismiss based upon its reading of the Seventh Circuit case, *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989). The district court held that admiralty jurisdiction did not apply because torts involving noncommercial pleasure vessels are not sufficiently related to traditional maritime activity within the meaning of *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972); and *Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982), unless the tort involves at least a potential threat to commercial shipping and involves navigation. The district court did not address the issue of whether or not the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.* creates an independent, statutory basis of subject matter jurisdiction in the federal courts, separate and distinct from the test for constitutional admiralty jurisdiction.

American Auto suggests that it is important for this Court to recognize the impact that its forthcoming opinion will have upon cases which are currently being adversely affected by the newly fashioned Seventh Circuit jurisdictional tests. The district court decision in *American Auto* exemplifies the logical inconsistencies that result from attempting to apply the Seventh Circuit rule to differing factual situations.

SUMMARY OF ARGUMENT

1. The Seventh Circuit interpreted the language in *Foremost* in an overly restrictive manner, in concluding that admiralty tort jurisdiction in cases involving pleasure vessels extends only to those cases which involve navigational wrongs and which have a potentially disruptive impact on commercial activity. In cases involving pleasure vessels, such an approach improperly restricts the definition of traditional maritime activity to only those cases directly involving collisions or those involving interpretations of navigational rules of the road.

2. The Seventh Circuit, by misconstruing this Court's decisions on admiralty jurisdiction (*Executive Jet* and *Foremost*), has created new tests to determine jurisdiction which would be extremely difficult to apply.

3. The Seventh Circuit's jurisdictional tests, if adopted by this Court, would result in a patchwork application of state and federal law to the same tortious event. *American Auto* illustrates that if the Seventh Circuit's tests are followed, when a single vessel burns and sinks in foreign waters, representatives of any decedents would be restricted to remedies permitted under DOHSA and the professional crew's rights and remedies would be defined by the Jones Act, 46 U.S.C. § 688 et. seq., yet the vessel owner would be deprived of admiralty jurisdiction, in any forum, to file its petition for exoneration from or limitation of liability.

4. The Limitation of Liability Act provides an independent basis of jurisdiction separate and distinct from the test necessary for finding the existence of constitutional admiralty jurisdiction. It provides a statutory basis for courts to exercise jurisdiction which does not require the involvement of traditional maritime activity within the meaning of *Executive Jet* and *Foremost*.

PRACTICAL CONCERNS RAISED BY THIS AMICUS WHICH MAY NOT BE ADDRESSED BY THE PARTIES TO THIS PETITION

The factual background to American Auto, Inc.'s limitation petition, should raise concerns with this Court as to the wisdom of adopting the Seventh Circuit's reasoning or restricting this

Court's expansive language in *Foremost*. The facts presented in *American Auto*, which this Court could consider at least in the context of raising hypothetical problems, illustrate the difficulty in interpreting *Foremost* restrictively.

As reflected by *In the Matter of the Complaint of American Auto, Inc., supra* and the briefs and record with the Ninth Circuit in that appeal (Court of Appeals No. 89-15685), the following facts were introduced on the admiralty jurisdictional issue in the *American Auto* case.

(1) The yacht ANTICIPATION, owned by American Auto, Inc. burned and sank at night while at her moorage off the coast of Cabo San Lucas, Mexico, on January 9, 1988.

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(3) At the time of the loss, the vessel had seven people on board, including two professional crew members.

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(9) The representatives of the two deceased passengers filed claims in the federal limitation action and separate suits in the California courts alleging DOHSA as a basis of jurisdiction.

The allegations made against American Auto involve the vessel's operation, management, maintenance, and seaworthiness. The claimants in *American Auto* have alleged, among other matters, that the vessel owner (1) failed to maintain a seaworthy vessel, particularly in regard to her fire warning systems; extinguishing systems and available escape routes; (2) failed to hire and train a competent, professional crew; (3) failed to maintain a proper lookout at night; and (4) failed to conduct adequate safety drills.

The foregoing facts and allegations portray a typical maritime casualty involving issues which traditionally have been, and should be resolved by admiralty courts. The Seventh Circuit's rule applied to such maritime casualties would deny the litigants access to the court best suited to try those issues, and, by so doing, would jeopardize the uniformity of the United States maritime law.

ARGUMENT

A. The Seventh Circuit Court Construed The Test For Maritime Jurisdiction Too Narrowly

1. The Maritime Jurisdiction Test Formulated By The *Executive Jet* And *Foremost* Cases.

Prior to the Supreme Court's decision in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), a tort was within admiralty jurisdiction if it occurred on navigable waters. *THE PLYMOUTH,* 3 Wall 20, 70 U.S. 20, 36, 18 L.Ed. 125 (1865).

In *Executive Jet, supra* and later in *Foremost supra* this Court held that a "situs" on navigable waters is not sufficient to create a maritime tort. In addition to occurring on navigable waters, the wrong must have "a significant connection with traditional maritime activity." *See, Foremost Insurance v. Richardson, supra,* at 674. This "relationship" requirement has come to be known as the "maritime nexus" requirement. *Guidry v. Durkin,* 834 F.2d 1465 (9th Cir. 1987).

2. *Foremost* Continued To Extend Admiralty Jurisdiction To Noncommercial Vessels To Promote The Uniformity Of Rules Of Conduct; It Did Not Confine The Test For Admiralty Jurisdiction To A Disruption Of Commercial Activity.

In *Foremost,* this Court, in upholding admiralty tort jurisdiction over a collision involving two pleasure vessels, expressly noted that such jurisdiction extends beyond commercial activities:

> We also agree that there is no requirement that "the maritime activity be an exclusively commercial one." . . . Because the "wrong" here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court.
>
> *Foremost Insurance v. Richardson, supra* at 674.

This Court in *Foremost* stressed, by its own choice of italicized words, the necessity for the uniformity of rules of conduct to be applied to the operators of all vessels:

> Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters

> are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce [emphasis in text].
>
> *Id.*

This Court then offered an example, but apparently not an exclusive test, regarding the potential disruptive impact of vessel collisions:

> For example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. Furthermore, admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its "navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters." [Citation omitted.] The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.
>
> *Id.*

From the above expansive language, it is apparent that this Court in deciding *Foremost* did not intend to confine its definition of traditional maritime activity to include only collisions or cases involving interpretations of the Rules of the Road.

The Seventh Circuit has interpreted footnote 5 to the *Foremost* case in an overly restrictive manner, and has ignored the broader language quoted above from the actual holding in the *Foremost* case. Footnote 5 provides:

> Fn.5. Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet,* for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the

> water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.
>
> *Id.* at 675.

The Seventh Circuit reasoned that since the *Foremost* decision mentioned that the "navigation" and "operation of a vessel" were "traditional maritime activities", jurisdiction was limited to cases involving wrongs arising out of those activities. *Sisson, supra*, at 345. The Seventh Circuit concluded (*Amicus* believes incorrectly) that:

> In our view, a persuasive interpretation of Foremost would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a "potentially disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.
>
> *Id.*

The Seventh Circuit emphasized how "limited its guidance" was in deciding the jurisdictional question:

> We are now presented with a case that tests the limits of the developing admiralty nexus doctrine: Does a fire on board a moored pleasure yacht, docked in the navigable waters of a recreational marina on Lake Michigan, bear a significant relationship to traditional maritime activity? Guidance from the [Supreme] Court on this question is limited to two cases: a collision in navigable waters between pleasure craft, that passes the test, and the crash of a land-based airplane in navigable waters, that fails the test.[1]

. . .

Fn. 1. We are obviously at an early stage in the development of doctrine here. The definitional boundaries are being refined through the process of inclusion and exclusion in particular cases.

Id. at 343.

The Seventh Circuit conceded that its holding applies "a narrow reading of 'traditional maritime activity' limiting application to cases involving navigation," stating that:

> Following the guidance given by careful scrutiny of the language in *Foremost*, we here apply a narrow reading of "traditional maritime activity," limiting application to cases involving navigation. Strong arguments, however, exist for broader treatment of this issue. Logically, fires aboard vessels — even when moored — are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners.
>
> . . .
>
> It is also somewhat puzzling to find the [*Foremost*] Court using a broad phrase such as "traditional maritime activity" in discussions that then proceed to deal only with navigation.

Id. at 345.

The Seventh Circuit, which admitted it was heading into uncharted legal waters, apparently did not appreciate that this Court in *Foremost* spoke extensively of "navigational" and "operational" concerns in the context of a "nexus with traditional maritime activity," only because the facts in *Foremost* involved a pleasure boat collision. One would not have expected this Court to engage in a lengthy discourse upon maritime fires, groundings, salvage operations, torts on pleasure vessels, or a multitude of other possible factual settings which might give rise to jurisdiction.

There can be little doubt that fire on a vessel is regarded as one of the greatest dangers at sea. *See, Southport Fisheries v. Saskatchewan Gov. Ins. Office*, 161 F.Supp. 81, 83-4 (E.D.N. Carolina 1958). The Seventh Circuit in this case admitted as much:

> Logically fires aboard vessels — even when moored — are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners.
>
> *In the Matter of the Complaint of Sisson, supra*, at 345.

Regulations promulgated by the United States Coast Guard promote and enforce fire safety on vessels. (See 46 C.F.R. §§ 72.03, 72.05, 72.15, 72.20 and § 76, generally.) Also, the *Safety of Life At Sea Convention* ("SOLAS"), 32 U.S.T. 47, has promulgated fire safety regulations utilized in evidence in federal maritime tort cases. *Meyers v. M/V EUGENIO C.*, 876 F.2d 38, 39 (5th Cir. 1989).

It is apparent that the Seventh Circuit became trapped in its "narrow interpretation" of traditional maritime activity, ignoring the underlying theme, principle and statement of the *Foremost* Court that:

> . . . petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. This interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. *Foremost v. Richardson, supra*, at 674-675.

In his concurring opinion in *Sisson*, Judge Ripple perceived that the majority had interpreted the language in *Foremost* too restrictively.

> In my view, *Foremost* does not compel restricting admiralty jurisdiction in noncommercial activities to matters directly involving the navigation of a vessel. In *Foremost*, the Supreme Court had to deal with an incident arising out of an alleged noncompliance with the "Rules of the Road." However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards

traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.

In the Matter of the Complaint of Sisson, supra, at 351.

More recently, the Sixth Circuit explicitly disagreed with *Sisson*, in the case of *In Re Young*, 872 F.2d 176 (6th Cir. 1989):

> . . . we do not subscribe to the reasoning of *Sisson*. As Judge Ripple points out in his concurrence, the opinion is predicated on an indefensibly narrow reading of *Foremost Insurance*.

Id. at 178.

B. The Seventh Circuit Tests Are Difficult And Uncertain of Application, Contrary To The Requirements Of *Foremost*

1. Requiring That A Tortious Event Involve Navigational Error And That It Have "A Potentially Disruptive Impact" On Maritime Commerce Creates A Vague, Unworkable Jurisdictional Test.

A vessel docked in a marina which is involved in a tort, such as The *ULTORIAN* in the case presently before this Court, may not offer dramatic appeal for inclusion within admiralty jurisdiction. Yet, this *Amicus* suggests that if this Court were to attempt to fashion a restrictive jurisdictional test, elements of which require both "navigational" error and the potential disruption of maritime commerce, such a test would be difficult to apply and unjust in its effect. Does a 65-foot vessel wrecked in 35 feet of water 50 yards from the shifting edge of a main shipping channel present a potential disruption? A 200-foot vessel burning in 20 feet of water 450 feet from the edge of a channel? Or what about American Auto's vessel, *The ANTICIPATION*, which was located adjacent to a main shipping channel, and which subsequently was ordered by foreign governmental authorities to be marked and removed as a hazard to navigation?

In the Matter of the Complaint of American Auto, Inc., supra, the uncertainty in applying the Seventh Circuit's jurisdictional test is illustrated by the district court's decision in *American Auto*, which recognized that the wreck "might" disrupt maritime commerce, but termed the chance "remote" and therefore failed to uphold admiralty jurisdiction. If the tests are allowed to remain as vague as stated by the Seventh Circuit, district and circuit courts will be forced to struggle with the jurisdictional limits, on a case-by-case basis.

2. The Seventh Circuit Tests Would Exclude From Admiralty Jurisdiction Some Cases In Which The Alleged Wrongs Include The Negligent Operation, Management, Maintenance And Unseaworthiness Of A Vessel.

The Seventh Circuit, noting that their facts tested the "limits" of admiralty jurisdiction (at pg. 343), addressed the agreed facts that (1) a defective washer/dryer caused the fire, (2) the fire occurred while the vessel was docked at a marina, (3) there were no personal injuries or deaths, and (4) there were *no allegations* regarding the negligent operation or maintenance of the vessel.

In contrast, in *American Auto*, (1) the cause of the fire remains unknown; (2) the fire occurred in foreign waters on a vessel moored hundreds of yards off shore in an open bay exposed to the Pacific Ocean; (3) there were multiple personal injuries and deaths, resulting in the applicability of federal maritime statutes, other than the Limitation Act; and (4) the representatives of deceased vessel passengers and personal injury claimants have brought claims against the vessel owner specifically alleging the negligent operation and maintenance of the vessel.

Literal adherence to the Seventh Circuit tests could result in a district court finding, just as the district court found in *American Auto*, that even where there are allegations of operational negligence, improper crewing, improper maintenance and unseaworthiness of a vessel, admiralty jurisdiction is inapplicable because the alleged "wrongs" were not "navigational" (in that no collision was involved) and the location of the wreck was unlikely to disrupt maritime commerce. Historically, admiralty courts have been concerned not only with the danger of fire at sea, but also that vessels are properly manned, operated, managed, maintained and are seaworthy. American Auto suggests that an adoption of the Seventh Circuit jurisdictional tests would result in precisely

the lack of uniformity over the conduct of vessels that this Court attempted to protect against in *Foremost*.

3. The Seventh Circuit Tests Would Exclude Some Cases In Which The Only Remedy For Deceased Passengers' Representatives Is Provided By The Death On The High Seas Act.

The Seventh Circuit tests raise the possibility that a vessel owner could be deprived of the right to petition to limit its liability under federal maritime law, while any deceased passengers' representatives would be compelled to assert DOHSA as a basis of jurisdiction. Specifically, DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain his suit for damages in the District Courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if the death had not ensued.
>
> 46 U.S.C. § 761.

The federal courts have ruled that the term "high seas" as it is used in the above statute refers to all waters beyond the United States coast, including off foreign countries. *In Re Aircrash Disaster Near Bombay, Etc.*, 531 F.Supp. 1175, 1183 (W.D. Wa. 1982); *Moyer v. Klosters Rederi*, 645 F.Supp. 620, 623 (S.D. Fla. 1986) (death in the territorial waters off Mexico.) In *Moyer*, decided long after the *Foremost* decision, the district court held that the death of a vacationing swimmer, who suffered a heart attack while snorkeling in Mexican waters, had "a significant relationship to traditional maritime activity" because the swimmer had journeyed to Mexico on a commercial cruise line.

By illustration, in the *American Auto* case, the California courts will be required to rule that DOHSA and its more restrictive damage provisions pre-empt state wrongful death law

as to the two suits brought by decedents' representatives because of this accident. *Nygaard v. Peter Pan Sea Foods, Inc.*, 701 F.2d 77 (9th Cir. 1983); *Moyer, supra*, at 624.[1]

If DOHSA provides the jurisdictional basis for passengers' claims, and sets the legal standards for liability and damages, how can it logically be held that there is no admiralty jurisdiction over a limitation action arising from the same event? Independent statutory schemes, such as DOHSA, the Jones Act, and the Limitation Act, all of which apply distinctly to matters maritime, cannot be viewed in a vacuum. The statutes operate in a complex interplay to protect the rights and define the obligations of the parties to maritime disputes.

4. The Seventh Circuit Tests Would Exclude Some Cases In Which Paid Crew Have The Status To Bring Jones Act Claims.

It is hornbook law that paid vessel crew members, such as the captain and deckhands in the *American Auto* case, have the right to bring personal injury actions against their employer under the Jones Act, 46 U.S.C. § 688, *et. seq.* Norris, *"The Law of Seamen"*, § 30:3, (4th ed. 1988).

Just as with the wrongful death suits, the question must be asked: "How can the paid captain and deckhands on a vessel have the right to bring actions for injuries under the Jones Act, while at the same time the vessel owner is deprived of its rights under the Limitation of Liability Act?" The Seventh Circuit's negative answer to that question is reached by an overly narrow, restrictive interpretation of the *Foremost* holding. This *amicus* believes that the law requires that all such parties should have access to

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[1] *See also: Jennings v. Boeing Company*, 660 F.Supp. 796, 803 (E.D. PA. 1987); *Mancuso v. Kimex, Inc.*, 484 F.Supp. 453 (S.D. Fla. 1980) (death 300 feet off the coast of Jamaica); *Sanchez v. Loffland Brothers Company*, 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. den.*, 452 U.S. 962, 101 S.Ct. 3112 (1981) (death on an inland Venezuelan lake); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277 (W.D. PA. 1983); *aff'd*, 735 F.2d 423 (3rd Cir. 1984), *cert. den.*, 459 U.S. 858, 105 S.Ct. 1888 (1984) (DOHSA applied to a death claim arising out of Bahamian territorial waters).

admiralty courts and admiralty remedies. That result can be achieved by rejecting the rule adopted by the Seventh Circuit.

5. It Is Logical, Fair, And Essential, That The Admiralty Jurisdiction Test Be Sufficiently Broad To Promote Uniform Rules Of Maritime Law Regarding Fire Safety On Vessels.

Once it is acknowledged that "traditional maritime activity" involves more than vessel navigation, it follows that any test for admiralty jurisdiction should be fashioned to promote, not minimize, uniform conduct and safety on all vessels. Such a rule can be fashioned by this Court by elaborating upon its language in *Foremost.*

The alternative would be to allow, on a case-by-case basis, various district courts to rule disparately whether cases involving issues of vessel maintenance, management, crewing, and multiple other aspects of conduct related to vessel operation, should or should not fall within the scope of admiralty jurisdiction. That would permit decisions such as the district court's decision in *American Auto;* which deprived the vessel owner of the opportunity to invoke the benefit and protection of the federal Limitation of Liability Act, despite the fact that the claimants have alleged the negligent operation, negligent maintenance, an incompetent crew and/or unseaworthy condition of the vessel; that wrongful death actions have been brought in state court by the representatives of deceased passengers under DOHSA; and that the two paid crew have the right to bring actions against the owner under the federal Jones Act.

A holding intimating that the federal government has no traditional concern to promote fire safety on all vessels, would stretch all credulity. Such a holding would result in a dramatically inequitable application of maritime statutes to all other vessel owners involved in litigation arising out of fire on board vessels.

C. The Limitation Of Liability Act Applies To Pleasure Vessels

American Auto concurs with the position of the United States, along with its reasoning and authorities cited, as to why the language of the Limitation Act must be interpreted, by rules of

statutory construction, to include "any vessel" [*Amicus Curiae of the United States,* filed in support of *Petition for Writ of Certiorari,* pp. 15-16, fn. 12]. Rather than re-briefing the same points, American Auto restricts its comments to the following.

1. Rules Of Statutory Construction Dictate That Pleasure Vessels Are Included Within The "Any Vessel" Language Of The Act.

One important rule of statutory construction was stated in *Air Transport, Etc. v. Profess. Air Traffic, etc.,* 667 F.2d 316 (2d Cir. 1981) as follows:

> First, we can presume that Congress is aware of settled judicial constructions of existing law. *Shapiro v. United States,* 335 U.S. 1, 16, 28 S.Ct. 1375, 1383, 93 L.Ed. 1787 (1948), and that it intends to retain those remedies that it has left in place, *Federal Maritime Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404, 412, 89 S. Ct. 1144, 1148, 22 L.Ed.2d 371 (1969).
>
> *Id.* at 321.

We can presume that in 1936 Congress knew that federal courts were construing 46 U.S.C. § 183(a) as applicable to pleasure yachts. If Congress did not intend for the limitation statutes to apply to pleasure yachts, the 1936 amendments were the time to say so. Instead, Congress did the opposite. In § 183(f) it ensured that limitation remained available for pleasure yachts without subjecting them to the $60 per ton provisions of § 183(b).

1 U.S.C. § 3 should eliminate any dispute over the meaning of the word "vessel":

> The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

According to § 3, then, every description of watercraft qualifies as a vessel. There is no requirement of a commercial purpose or use. This Court has held that a yacht or pleasure craft is a vessel under 1 U.S.C. § 3, *Foremost, supra* at 668, and that 1 U.S.C. § 3 should be used to define the word "vessel" as that word is used in

46 U.S.C. § 183(a). *Evansville & B.G. Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S.Ct. 379, 70 L.Ed. 805 (1926).

Based upon the above rules of statutory construction, this Court has held the limitation statute applicable to pleasure yachts. *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941); *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943).

All circuit courts which have addressed the issue have construed the Limitation of Liability Act as applying to pleasure vessels. Since 1886, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have applied the Act to pleasure vessels.[2] Within only the last few months, the Ninth and Eleventh Circuits have, by applying rules of statutory construction, upheld the Act's application to pleasure vessels. *In The Matter of the Complaint of Hechinger*, 890 F.2d 202, 206 (9th Cir. 1989); *In the Matter of the Complaint of Keys Jet Ski, Inc.* (11th Cir., 1990, Slip Opinion at 1525-1526.)

2. Logic, Public Policy and Fairness Require That Pleasure Vessels Be Given The Benefit of The Act.

Neither logic nor public policy supports a practice of allowing "commercial" interests to limit liability while denying that right to pleasure and recreational boat owners.

In the first place, carving out a pleasure boat exception would require that a line be drawn between "pleasure boating" and "commercial boating." In *Foremost*, this Court rejected a similar distinction for the purpose of tort jurisdiction because of the uncertainties sure to be created:

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[2]*See, Complaint of Interstate Towing Co.*, 717 F.2d 752 (2d Cir. 1983); *Richard v. Blake Builder's Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *Warnken v. Moody*, 22 Fed 960 (5th Cir. 1927); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *Holloway Concrete Products Co. v. Belts Beatty, Inc.*, 293 F.2d 474 (5th Cir. 1961); *Rauthbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Pritchett v. Kimberling Cone, Inc.*, 568 F.2d 570 (8th Cir. 1977); *In Re Hechinger*, 890 F.2d 206 (9th Cir. 1989); Petition of *M/V SUNSHINE II*, 808 F.2d 762 (11th Cir. 1987).

> Yet, under the strict commercial rule proffered by petitioners, the status of the boats as "pleasure" boats, as opposed to "commercial" boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in *Executive Jet*. Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been rented, or whether it had ever been used for commercial fishing, control the existence of federal-court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.
>
> *Foremost v. Richardson, supra*, at page 676.

Creating a pleasure boat exception would also constitute bad public policy. Presumably, a vessel carrying passengers for hire would be a commercial vessel, no matter how large or small the vessel. The owner of such a vessel — one who charged a fee for providing transportation — could limit his liability; the generous host who gave a friend a ride in his yacht could not. Yet, the commercial operator would be more likely, due to regulations and financing agreements, to carry substantial liability insurance. Small boat owners, who, under the respondents' theory would not have the protection of the Act, would be more likely to be uninsured or have low insurance limits.

D. The Limitation Statute Itself Provides A Basis Of Jurisdiction

Limitation of liability is not a part of the traditional or constitutional United States admiralty law. Limitation of liability is a concept and a proceeding first established by statute in 1851. In *Norwich and N.Y. Trans. Co. v. Wright*, 13 Wall. 104, 80 U.S.

104, 20 L.Ed. 585 (1871), this Court acknowledged the statutory basis of a limitation action:

> The court having jurisdiction of the case under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties.
>
> *Id.* at 592.

In *THE HAMILTON*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), this Court again recognized the statutory basis of the Act's jurisdiction:

> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so.
>
> *Id.* at 406.

In *Executive Jet, supra*, this Court considered traditional or constitutional admiralty jurisdiction in maritime tort cases. In at least two places the opinion recognizes an independent statutory basis for admiralty jurisdiction. First, this Court held:

> . . . [t]hat unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.
>
> *Id.* at 268.

Later, this Court averred that:

> . . . Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.
>
> *Id.* at 274.

1. The Statute Directs That A Limitation Complaint Be Filed In The District Court.

As originally enacted in 1851 the limitation statutes did not specify the court which would enforce or apply them. The only reference to legal action was the provision that ". . . the owner or

owners of the vessel, or any of them, may take the appropriate proceedings in any court. . .," found in 46 U.S.C. § 184. This Court then decided that the district courts were the place for such "appropriate proceedings."

> . . . Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State Courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this Court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding.
>
> *Norwich & N.Y. Trans. Co. v. Wright, supra*, at 592.

In 1936 Congress amended 46 U.S.C. § 185 to specifically set forth the procedure to be followed by a vessel owner to claim limitation of liability. Congress added the following language to Section 185:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter . . .

In *Executive Jet*, this Court recognized the power of Congress to enlarge admiralty jurisdiction, *Executive Jet, supra*, at 274. The limitation statute is legislation which enlarges the admiralty jurisdiction. Consequently, the limitation of liability case falls squarely within the "legislation to the contrary" exception to *Executive Jet*.[3]

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[3]Two district courts have recognized the "legislation to the contrary" exception, *In Re Aircraft Disaster Near Bombay*, 531 F.Supp. 1175, 1182-84 (W.D. Wa. 1982), *Friedman v. Mitsubishi Aircraft Intern.*, 678 F.Supp. 1064, 1065 (S.D.N.Y. 1988).

2. Admiralty Jurisdiction In A Limitation Case Does Not Depend On The Nature Of The Claims Filed.

Section 183 of the limitation statute provides that a shipowner may limit his liability for any loss or destruction of property, or any loss, damage or injury by collision or for any act, matter, or thing, loss, damage or forfeiture done, occasioned or incurred without the owner's privity or knowledge. In 46 U.S.C. § 189 it is further provided that the individual liability of a shipowner shall be limited to the proportion of "any or all debts and liabilities that his individual share of the vessel bears to the whole."

Nowhere does the statute say that the only claims subject to limitation are claims which could have been asserted against the owner in admiralty. The statute does not say the owner may limit only against claims arising out of traditional maritime activities. On the contrary, this Court held that the addition of § 189 to the statute in 1884 "was intended to add to the enumerated claims of the old law any 'and all debts and liabilities' not theretofore included" and "whether the liability be strictly maritime or from a tort non-maritime." *Richardson v. Harmon*, 222 U.S. 96, 105-06, 32 S.Ct. 27, 56 L.Ed. 110 (1911). The limitation statute, then, encompasses all claims occurring without the privity or knowledge of the shipowner, whether they be maritime claims or not. *Richardson* expressly decided that the statute allows a shipowner to maintain a limitation action in admiralty to limit his liability for non-maritime torts. *Id.*

This *Amicus* suggests that caution be exercised regarding this Court's reconsideration of the *Richardson* decision. That decision was not a judicial definition of district court jurisdiction. It was an interpretation of a federal statute. The *Richardson* Court held that Congress, in adding § 189, intended to include non-maritime claims within the scope of the Limitation Act. Nothing has happened since the time of the *Richardson* decision to justify or necessitate a re-examination of Congressional intent. To the contrary, Congress has tacitly agreed with this Court's interpretation by periodically amending the Limitation Act without changing the *Richardson* rule.

The correctness of the *Richardson* decision is illustrated by the following: Following *Richardson*, (1) there have been, until recent years, relatively few jurisdictional inconsistencies over the seventy-nine years the federal courts have interpreted jurisdiction under The Act, (2) the federal courts have been able, through the limitation concursus procedure, to join all claimants, whether maritime or non-maritime, in a single, orderly action, with a single common fund, to be appropriately distributed among competing claims, and (3) vessel owners have been able to depend upon the rule that all of their liabilities, whether maritime or non-maritime, may be resolved without being burdened with the uncertainty that some claims, after extensive factual discovery, might be deemed "non-maritime" and therefore not subject to limitation. Overruling *Richardson* at this late date not only would be unwarranted by any accepted principle of statutory construction but would disrupt a pattern of practice to which admiralty courts have been able to apply consistently to create a coherent body of maritime law.

This Court has repeatedly described the broad powers and jurisdiction of the admiralty courts in limitation cases:

> But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (citations omitted) to do what is exceptional in a court of admiralty — to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court.
>
> *Hartford Accident & Indemnity Co. v. Southern Pacific*, 273 U.S. 207, 220; 47 S.Ct. 357, 71 L.Ed. 612, 617 (1926).
>
> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle, but is the result of the statute which

provides for, as well as limits, the liability, and allows it to be proved against the fund.

THE HAMILTON, 207 U.S. 398, 406, 28 S.Ct. 407, 52 L.Ed. 264, 270 (1907).

In fact, the rule is so well established that Gilmore and Black state:

"The hornbook law of the matter today is that § 189: (1) extended the Limitation Act to cover non-maritime claims . . ."

Gilmore and Black, *The Law of Admiralty*, 2d edition at 846.

Under all the foregoing authorities it is clear that the Limitation Act itself confers broader statutory jurisdiction than would exist solely under an analysis of *constitutional* admiralty jurisdiction. The Seventh Circuit erred in failing to recognize this distinction.

3. The Seventh Circuit's Tests Would Deny Vessel Owners Due Process.

In *Executive Jet* and in *Foremost* this Court was deciding which of two court systems (federal court sitting in admiralty or state court) was the proper one in which the plaintiff should have filed his action. In *Executive Jet* the plaintiff's action was dismissed because he made a mistake; he sued in the wrong court. The decision left him free to pursue his remedy in a proper court. By contrast, if the Seventh Circuit's decision stands in this case, petitioner will be unable to litigate his statutory limitation rights in any court.

A petitioner has a right, under the limitation statute, to file an action to claim limitation and to have that right to limitation tried and adjudicated. A state court may not decide whether a shipowner is entitled to limitation. *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1931); *In Re Woods' Petition*, 230 F.2d 197 (2d Cir. 1956). The effect of the Seventh Circuit's decision is to deprive vessel owners of a substantive right without due process, or any process at all. Vessel owners cannot proceed in state court to claim the benefit of the limitation statute. If a vessel

owner is not allowed to assert his claim to limitation in the admiralty court, he will be denied the right given him by the statute; his claims for limitation will be "incapable of execution." As this Court said in *Norwich v. Wright, supra.* "This is never to be done if it can be avoided." *Id.* at 592.

CONCLUSION

Amicus American Auto respectfully submits that the Seventh Circuit, in dismissing for lack of admiralty jurisdiction: (1) misinterpreted or ignored congressional intent as expressed in the Limitation Act and (2) misinterpreted or ignored decisions of this Court defining admiralty jurisdiction, both constitutional and statutory. The decision below should be reversed to avoid confusion and injustice and to promote uniformity in the resolution of maritime disputes.

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Respectfully submitted,

TERENCE S. COX
(COUNSEL OF RECORD)
DENNIS J. HERRERA
DERBY, COOK, QUINBY & TWEEDT
333 Market Street, Suite 2800
San Francisco, CA 94105
(415) 777-0505
Attorneys for Amicus Curiae American Auto, Inc.